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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Communications Assistance for
Law Enforcement Act

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CC Docket No. 97-213

To: The Commission

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

NEXTEL COMMUNICATIONS, INC.

Albert Gidari
PERKINS COIE
1201 Third Ave., 40th Floor
Seattle, WA 98101
(206) 583-8688

Dated: May 20, 1998

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SUMMARY

Nextel Communications, Inc. ("Nextel") submits these comments regarding the scope of the assistance capability requirements necessary to satisfy the obligations imposed by Section 103 of the Communications Assistance for Law Enforcement Act ("CALEA"). Nextel's Comments in this proceeding are primarily concerned with the services it provides that were generally referenced in the petitions giving rise to this proceeding. Nextel has commented and intends to further participate in those related proceedings involving additional services offered by Nextel and may have further comments on certain issues discussed herein as they relate to those other services.

Nextel requests that the Commission ensure a cost-efficient implementation of CALEA. Nextel asks the Commission to reject the enhanced surveillance capabilities sought by the Department of Justice and to declare the industry standard as a safe harbor. Should the Commission decide to make any changes to the standard in response to pending petitions by either adding or deleting functions, Nextel urges the Commission to remand the changes to the industry standards committee for technical implementation and to ensure compatibility with current standards.

Finally, the Commission should conduct a thorough review to determine if any compliance is reasonably achievable today for all equipment, facilities or services installed after January 1, 1995. In any case, the Commission must ensure that any rule it makes meets CALEA's requirements in the most cost-efficient manner.

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COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel"), through its attorneys, submits these comments regarding the scope of the assistance capability requirements necessary to satisfy the obligations imposed by Section 103 of the Communications Assistance for Law Enforcement Act ("CALEA") as requested by the Federal Communications Commission ("Commission") Public Notice dated April 20, 1998.¹

Nextel applauds the Commission's request for analysis of whether the capabilities discussed in the petitions of the Center for Democracy and Technology ("CDT")² and the U.S. Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI") [collectively, "DOJ"]³ fall within the scope of CALEA. However, the Commission should go

¹ *In the Matter of Communications Assistance for Law Enforcement Act*, CC Docket 97-213, DA 98-762, (April 20, 1998) ("Public Notice") at 4.

² *In the Matter of Communications Assistance for Law Enforcement Act*, CDT Petition for Rulemaking under Sections 107 and 109 of the Communications Assistance for Law Enforcement Act, filed March 26, 1997 [hereinafter "CDT Petition"].

³ *In the Matter of Establishment of Technical Requirements and Standards for Telecommunications Carrier Assistance Capabilities Under the Communications Assistance for Law*

farther to determine whether the industry developed standard, J-STD-025, itself meets CALEA in the most cost-efficient manner as required by Section 107(b). Nextel urges the Commission to review the standard in its entirety to determine whether it is cost-efficient as drawn before considering DOJ's additional capabilities. Nextel is concerned that the standard alone may not be reasonably achievable even without the added fringe of enhanced capabilities sought by DOJ.

Nextel also supports the CDT Petition and industry association comments insofar as they seek Commission review of whether compliance with the industry standard is reasonably achievable for equipment, facilities or services deployed after January 1, 1995.⁴ The Public Notice did not expressly address the reasonable achievability issue, but Nextel believes that the Commission cannot realistically determine whether the standard meets CALEA unless it first determines that solutions built to the standard will be affordable.

Further, while Nextel generally supports the development and use of industry standards for CALEA implementation, the Commission's ultimate standard should not become a checklist of compliance for those who choose to comply in other ways. In other words, whatever action the Commission takes in this proceeding, the resulting rule or order should ensure that carrier protections under CALEA are retained. Compliance with a standard, and therefore the rule, must be recognized to be voluntary, leaving carriers free to choose other implementations that may be cheaper or more efficient for their networks. Carriers must retain the right to petition for future extensions, if necessary, and determinations of whether compliance is reasonably achievable.

Enforcement Act, DOJ and FBI Joint Petition for Expedited Rulemaking filed March 27, 1997 [hereinafter "DOJ Petition"].

⁴ See CDT Petition at 10; see also Response to Petition for Rulemaking of Cellular Telecommunications Industry Association ("CTIA"), Personal Communications Industry Association and United States Telephone Association, filed April 9, 1998.

As to the substance of the current standard debate, Nextel does not support its expansion to include the so-called "punch list" items. There is no support in CALEA for the expansive reading proffered by DOJ. Just the opposite, Congress directed DOJ, and the Commission, to interpret CALEA narrowly.⁵

I. BACKGROUND

Nextel is the Nation's largest provider of traditional and wide-area Specialized Mobile Radio ("SMR") services. Traditional SMR services are true "push-to-talk" analog dispatch communications. Nextel's wide-area digital services combine mobile telephony, paging and an enhanced "push-to-talk" dispatch service known as "Nextel Direct Connect" in a single handset.

First licensed by the Commission in the late 1970's, there are now thousands of traditional SMR systems operated by independent businesses throughout the country. These analog SMR services are most often used by messenger services, delivery companies and other businesses with a fleet of workers spread throughout a local area during normal working hours. Nextel's predecessor, Fleet Call Inc., began operating such a service in early 1988, and Nextel continues to offer the service today.

Some analog dispatch systems do have limited interconnection to the Public Switched Telephone Network ("PSTN") and allow subscribers to make outgoing calls. Typically, this interconnect capability is limited in that no customer on the analog system is assigned its own telephone number, no customer is assured the ability to make an outgoing phone call at any time, and there is no switching capability on the system.

Nextel's digital cellular services include interconnection with the PSTN. However, Nextel's digital Direct Connect service does not connect to the PSTN. Direct Connect enables communications only with other members of the same "fleet" who are located within a

⁵ H. Rep. No. 103-837, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3502-03.

defined geographic area by means of a private (one-to-one) call or a "group call." When a caller initiates a group communication, the system does not account for or recognize which mobile units or how many actually respond to the call. Rather, the system "lights up" the cell site on which a group member is operating without regard to which group member it is.

Like other digital carriers, Nextel has received wiretap orders for its mobile telephone services and cooperates fully with law enforcement in the execution of such orders where possible. However, upgrades to the switching equipment, which is provided by Nortel Telecom Inc. ("Nortel"), will be necessary to provide the sort of capabilities requested by law enforcement to meet CALEA. Currently, technology is not available to meet CALEA's requirements and Nextel has not been informed when such technology will be available or what it might cost.⁶

Nextel has participated in the Commission's proceedings to date and has a significant interest in the outcome because, as a relatively new entrant seeking to compete with more established wireless and wireline companies, the impact of CALEA on the company and its subscribers may be severe.

II. THE COMMISSION MUST DETERMINE WHETHER COMPLIANCE IS REASONABLY ACHIEVABLE AND MAY ONLY ISSUE COST-EFFICIENT RULES FOR SECTION 103

Under Section 107, the Commission may only set standards or requirements that implement Section 103 of CALEA by cost-efficient methods, minimize the cost of compliance

⁶ Nextel uses the Nortel DMS-100 switch for its telephony services. Nortel has advised the Commission that it does not currently have CALEA-compliant technology available for its customers and will not until 24-36 months after the Commission acts on the various pending petitions. Comments of Northern Telecom Inc., CC Docket 97-213, filed May 8, 1998, at 4. Nortel also advises the Commission that it has "assessed the development implications based upon [the standard and the DOJ "punch list"] and is confident that they are reasonably achievable on the [DMS-100]." *Id.* Nextel, however, has not been provided with any cost or price data to determine whether or not the upgrades will be affordable, particularly as applied to its unique combination of cellular Nextel Direct Connect and messaging service, or otherwise meet the factors the Commission must examine under Section 109 of CALEA, 47 U.S.C. § 1008.

on subscribers, protect the privacy of communications not authorized to be intercepted, and encourage the provision of new technologies and services to the public.⁷ If the costs of compliance are too high; if compliance will preclude the introduction of new services or reduce competition; if the proposed standard cannot adequately protect privacy; then the Commission must reject the proffered capabilities.⁸ Without knowing the cost or impact, Nextel questions how the Commission can carry out these obligations. Indeed, the Commission must conduct a thorough review of the cost impacts of the standard and the punch list before any final rule is published or any carrier required to meet CALEA. This approach is only common sense. No manufacturer wants to develop technology for CALEA compliance only to find that the cost is too high, it cannot be made available at a reasonable charge, and its carrier-customer will seek relief at the Commission through a petition for a determination of whether compliance is reasonably achievable.

The Commission also has been asked to find that compliance with CALEA's capability requirements is not reasonably achievable with respect to equipment, facilities or services installed or deployed after January 1, 1995.⁹ Under Section 109, unlike Section 107(b), if the Commission finds that compliance is not reasonably achievable, carriers will be deemed in compliance with Section 103 unless the Attorney General agrees to pay the incremental costs necessary to make compliance achievable. Nextel believes that a reasonable achievability

⁷ 47 U.S.C. § 1006(b)(1)-(4).

⁸ The Commission has a direct mandate from Congress, both in CALEA, 47 U.S.C. §§ 1006(b)(4), 1008(b)(1)(G) & (I), and in the Section 706 of the Telecommunications Act of 1996, to ensure that competition and innovation proceeds. CALEA has the potential to serve as a huge barrier to new entry in telecommunications markets and to forestall competition if CALEA compliance substantially raises subscriber rates. Incumbent wireline carriers providing basic POTS incur no CALEA costs unlike wireless carriers who would bear the brunt of CALEA upgrades. This is a critical question for the Commission and should not be lost in the Section 103 capability debate

⁹ CDT Petition at 10. CTIA Response at 14.

determination is required before the Commission can decide that a rule implements CALEA by cost-efficient methods.

Nextel also notes that there are many unsettled questions regarding a carrier's financial obligations under CALEA. There is a disagreement, for example, over who pays for capacity after September 12, 1998.¹⁰ DOJ asserts that it falls on carriers.¹¹ There is a disagreement over what it means for a telecommunications carrier's equipment, facilities or services "to be installed or deployed" on or before January 1, 1995. On March 20, 1997, the FBI promulgated regulations that defined "installed or deployed" to mean "on a specific switching system, equipment, facilities, or services are operable and available for use by the carrier's customers."¹² Nextel, for example, understands that the FBI believes that carriers that use GSM-based technology like Nextel are not entitled to any reimbursement under this definition of installed or deployed. Rather, the FBI says, GSM networks must be made compliant at the carrier's own cost because GSM was not available in the U.S. prior to 1995.¹³

The FBI's definition has been challenged in federal court and the Commission has been asked to initiate a Section 109 proceeding to determine whether compliance is reasonably achievable under DOJ's definitions for post-January 1995 installations of already deployed

¹⁰ See H. Michael Warren, Senior Project Manager/Chief, CIS, letter to Albert Gidari, Perkins Coie, dated April 14, 1998.

¹¹ *Id.*

¹² 28 C.F.R. § 100.10.

¹³ GSM, or Global System for Mobile telecommunications, was developed in the early 1980's with commercial service available by mid-1991. Before CALEA became law, there were 36 GSM networks in 22 countries, with 1.3 million subscribers. Now there are more than 70 million subscribers in 109 countries. As the Commission knows, the U.S. market ultimately was opened to GSM in 1994 when the Commission auctioned spectrum in the 1900MHz band. Notwithstanding the FBI definition, as a fact, GSM was deployed around the world well before January 1995 and was installed by Nextel in the United States in one of its switches prior to January 1995. Yet under the FBI definition, Nextel must pay the cost to make GSM CALEA-compliant. The cost of doing so would be prohibitive and in any event, the technology is not currently available to do so.

equipment, services or facilities.¹⁴ Nextel supports that request because it makes no sense to put carriers and manufacturers to the work of designing solutions that carriers cannot afford to purchase to retrofit existing and operational equipment. Until this question is settled, the Commission cannot determine whether compliance will be reasonably achievable or cost-efficient.

Nextel urges the Commission to conduct a complete inquiry into the costs and impacts of CALEA compliance before finalizing its rule. Accordingly, the Commission should begin a reasonably achievable inquiry as part of this rulemaking; otherwise, it certainly will be faced with reasonable achievability petitions later, the determination of which will only further delay CALEA implementation and increase costs to all concerned. Finally, the Commission should make clear in any order that compliance with any resulting standard from these proceedings will be a safe harbor for the industry.

III. THE COMMISSION SHOULD STREAMLINE THE CAPABILITIES IN THE EXISTING STANDARD AND REJECT THE CAPABILITIES REQUESTED BY DOJ

First, Nextel urges the Commission to begin its review of the scope of CALEA requirements by recognizing that CALEA is an exception to the broad, general prohibition on wiretapping and must be viewed narrowly, as Congress advised:

The Committee urges against overbroad interpretation of the requirements. The legislation gives industry, in consultation with law enforcement and subject to review by the FCC, a key role in developing the technical requirements and standards that will allow implementation of the requirements. The Committee expects industry, law enforcement and the FCC to narrowly interpret the requirements.¹⁵

¹⁴ See Joint Industry Response at 14.

¹⁵ House Report at 3502-03.

Contrary to this admonition, the DOJ Petition interprets CALEA broadly at every turn.¹⁶

Before looking to the additional capabilities desired by law enforcement, the Commission should ask what the current standard provides and whether it is consistent with the narrow intent of Congress. J-STD-025 defines the interfaces between a carrier and law enforcement for conducting electronic surveillance. The standard was created by industry, in consultation with law enforcement, to facilitate compliance with the assistance capability requirements of Section 103 of CALEA and, with law enforcement's encouragement, to help ensure efficient and industry-wide implementation of CALEA's requirements.

As Nextel reads the standard, it provides law enforcement access to the content of communications and to related call-identifying information. There are call-identifying information messages to inform law enforcement that a party has answered a call; the system has routed a call dialed by the subscriber or the system has translated a number for the subscriber; a call has been redirected, forwarded, diverted or deflected; the facilities for the entire call have been released and a call attempt to the subscriber has been detected. In addition, messages are provided to report the beginning and end of call content delivery. Finally, there is also a message to report when a mobile subscriber is authorized for service on another system. In short, the standard already provides all of the information necessary to identify the origin, direction, destination or termination of call as required by Section 103.

Given this fact, Nextel has specific concerns about DOJ's definition of call-identifying information, DOJ's failure to acknowledge when call-identifying information is not reasonably available, and then, about the standard itself, which appears to provide for and require significantly more information than CALEA mandates. These issues echo the concerns noted

¹⁶ See e.g., DOJ Petition at 34 ("The broad definition of call-identifying information in CALEA. . .").

above about whether the standard as currently drafted is the most cost-effective implementation.

CALEA defines call-identifying information to mean:

dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier.¹⁷

Telecommunications carriers must enable the government "to access call-identifying that is reasonably available to the carrier."¹⁸ The industry standard limits call-identifying information, at least by definition, essentially to numbers dialed to or from a subscriber.¹⁹ The standard assumes that call-identifying information is "reasonably available" if the information is present at an intercept access point for call-processing purposes.²⁰ DOJ, however, would define call-identifying information to include "all dialing and signaling" without regard to its reasonable availability or the limitation in the statute that such information only identify the origin, destination, direction or termination of a call.²¹

In contrast to DOJ's expansive view, Congress explained what it meant by call-identifying information for voice communications: "the numbers dialed or otherwise transmitted for the purpose of routing calls through the carrier's network."²² For pen register cases, Congress understood the CALEA requirements to be limited to "the numbers dialed

¹⁷ 47 U.S.C. § 1001(2).

¹⁸ 47 U.S.C. § 1002(a)(2).

¹⁹ J-STD-025, Section 3.0, Definitions.

²⁰ J-STD-025, Section 4.2.1, Assumptions.

²¹ See DOJ Petition, Appendix A.

²² House Report at 3501.

from the facility that is the subject of the court order."²³ For trap and trace investigations, Congress limited call-identifying information to "the originating number of the facility from which the call was placed and which are captured when directed to the facility that is the subject of the court order."²⁴ Congress expressly stated that "[o]ther dialing tones that may be generated by the sender that are used to signal customer premises equipment of the recipient are not to be treated as call-identifying information."²⁵ and therefore carriers have no obligation under CALEA to provide them.²⁶

Nextel understands that traditional pen registers for analog communications captured more dialing and signaling information than just the numbers dialed. But Congress did not require carriers or their manufacturers to continue to provide that extraneous information, even though it might have had some tangential investigative value for law enforcement in the past. For example, Nextel recognizes that a "busy signal" might indicate that someone is home at the subscriber's house in the wireline world (or just as likely, that a cat knocked the

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Nextel does not understand DOJ's insistence that carriers provide "post-cut-through" dialing in light of this clear statement of Congress to the contrary. DOJ Petition at 38-42. Director Freeh himself testified before Congress that he did not want such information:

I do not want that access, and I am willing to concede that. What I want with respect to pen registers is the dialing information: telephone numbers which are being called, which I have now under pen register authority. As to the banking accounts and what movies somebody is ordering at Blockbuster, I do not want it, do not need it, and I am willing to have technological blocks with respect to that information.

Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services: Joint Hearings before the Subcommittee on Technology and the Law of the Senate Committee on the Judiciary and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103rd Cong., 2d Sess., 50 (1994) (Testimony of FBI Director Freeh).

phone off hook), but such signals are not *call-identifying*. They do not tell law enforcement the number of the person that called, the number the subscriber called, the number to which the call was routed or whether the call was incoming or outgoing. In short, a busy signal is not necessary to route a call nor does it identify a call in any sense of the term.

Nextel also questions DOJ's requirement to identify whenever a party to a conference call joins in or drops out.²⁷ DOJ admits that they never received such information in the past.²⁸ The technology currently in use by Nextel does not generate such information, and it serves no useful business purpose to do so. The messages requested by law enforcement would force a significant redesign of current systems at substantial cost, contrary to clear Congressional direction. As Congress stated in passing CALEA: "if such information is not reasonably available, the carrier does not have to modify its system to make it available."²⁹ Nextel urges the Commission to include in any rule a clear definition that call-identifying information is not reasonably available if the carrier does not collect and process the information to route calls or for some other business purpose. Only such a definition will prevent the radical redesign of systems sought by DOJ.³⁰

Law enforcement argues that call-identifying information has to be construed broadly because "[a]s technological changes have made possible new communications services, new information is generated regarding the use of such services by subscribers."³¹ But CALEA did

²⁷ DOJ Petition at 42.

²⁸ DOJ Petition at 42 ("law enforcement was unable to obtain information that a particular participant was placed on hold during, or dropped from, a multi-party call.")

²⁹ House Report at 3502.

³⁰ Nextel reminds the Commission that CALEA prevents law enforcement from requiring any specific design of equipment, facilities, features, or system configuration. 47 U.S.C. § 1002(b)(1)(A). The Commission cannot allow DOJ to circumvent this prohibition by accepting its specific design requirements submitted in the form of a proposed rule in its deficiency petition.

³¹ DOJ Petition at 26.

not require carriers to provide "new information"; nor did it require carriers "to provide law enforcement with *any* signaling information indicating *how* the network treated a call attempt"³²; nor did it require carriers to provide all network signaling "that can be sensed by the subject."³³ If Congress had intended such broad requirements, it would have required carriers to provide "network signaling associated with calls" or some other such location. Instead, it limited carrier obligations to provide the numbers dialed that direct calls. The Commission can require no more.

Finally, as a review of the standard and its detailed messages will disclose, the standard as drafted requires carriers to provide enormous amounts of information that is not required by CALEA.³⁴ Such complexity can only add to the cost of CALEA compliance. Nextel urges the Commission to determine whether much less message encoding and information might be provided. There is very little complexity required to identify the numbers dialed relative to a particular communication and to associate those numbers with the call content. Cost-efficient implementation requires such a review; otherwise, the Commission no doubt will be reviewing the cost of compliance in the future on a carrier-by-carrier basis through Section 109 petitions.

³² DOJ Petition at 46.

³³ DOJ Petition at 47. Nextel notes that the subject and subscriber are not always the same person. A carrier's obligations go only to the subscriber who is the subject of the court order, not to the subject of the investigation, who may or may not even be on a call being monitored. DOJ's proposed rule would change the focus of surveillance away from the subscriber's facilities and towards whomever is the "subject" of the investigation. This would have major impacts on how surveillance is conducted today and would undo J-STD-025 completely because it is based on the subscriber, not the subject.

³⁴ For example, the standard provides a location parameter for most messages. Location tracking specifically is not required by CALEA and should not be included in the standard. Nextel supports CDT's Petition in that regard.

IV. PRESERVING THE VOLUNTARINESS OF THE STANDARD AND REMANDING TO INDUSTRY STANDARDS GROUP

The Commission should make clear that its resulting standard will be purely voluntary, but a "safe harbor" for those who implement it so long as its requirements are met. However, it must be made clear that nothing in CALEA prevents a carrier from adopting another technical solution so long as it meets the capability requirements of Section 103. DOJ concurs.³⁵

Further, the Commission must ensure that nothing it does in the form of a rule infringes on other carrier protections in CALEA. Promulgation of a rule alone should not, for example, imply that compliance is reasonably achievable.³⁶

Finally, Nextel supports remanding any final determination on capabilities to TIA's TR45 expert committee. Its members uniquely understand J-STD-025 and electronic surveillance requirements. They will be able to ensure integration with J-STD-025 of any new requirements or deletion of existing capabilities. They also will be able to ensure interoperability between the differing equipment and services. Law enforcement participates on this committee and the Commission, if it felt it necessary, could assign staff to participate as well. This will be the most efficient method of completing any standards work necessary at the end of these proceedings.

³⁵ See DOJ Comments Regarding the Commission's Authority to Extend the October 25, 1998 Compliance Date, CC Docket 97-213, filed May 8, 1998 at 6, 12-14 (compliance with industry standard and Commission rule is voluntary; Section 103 applies whether or not there is a standard.)

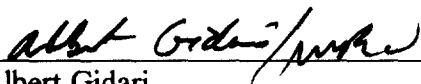
³⁶ Indeed, even if the Commission undertakes a generic review of the cost of compliance under Section 109, some carriers still may have individual circumstances that warrant review.

V. CONCLUSION

Nextel urges the Commission to take immediate steps to ensure the cost-efficient implementation of CALEA. It should reduce the standard's complexity, reject the additional enhanced surveillance capabilities sought by DOJ, and conduct a thorough review to determine if any compliance is reasonably achievable today for all equipment, facilities or services installed after January 1, 1995.

NEXTEL COMMUNICATIONS, INC.

Respectfully submitted,

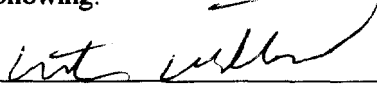


Albert Gidari
PERKINS COIE
1201 Third Ave., 40th Floor
Seattle, WA 98101
(206) 583-8688

May 20, 1998

CERTIFICATE OF SERVICE

I, Martin Willard, hereby certify that on this 20th day of May, 1998, a copy of the forgoing Comments of Nextel Communications, Inc. was delivered either by U.S. Mail or hand delivery (noted by asterisk) to the following:



Federal Communications Commission:

The Honorable William E. Kennard, Chairman *
Federal Communications Commission
1919 M Street, N.W. - Room 814
Washington, D.C. 20554

The Honorable Harold Furchtgott-Roth, Commissioner *
Federal Communications Commission
1919 M Street, N.W. - Room 802
Washington, D.C. 20554

The Honorable Susan Ness, Commissioner *
Federal Communications Commission
1919 M Street, N.W. - Room 832
Washington, D.C. 20554

The Honorable Michael Powell, Commissioner *
Federal Communications Commission
1919 M Street, N.W. - Room 844
Washington, D.C. 20554

The Honorable Gloria Tristani, Commissioner *
Federal Communications Commission
1919 M Street, N.W. - Room 826
Washington, D.C. 20554

Christopher J. Wright *
General Counsel
Federal Communications Commission
1919 M Street, N.W. - Room 614
Washington, D.C. 20554

Linda Morrison *
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W. - Room 614
Washington, D.C. 20554

Daniel Phythyon, Chief *
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W. - Room 5002
Washington, D.C. 20554

David Wye (15 copies) *
Technical Advisor
Federal Communications Commission
2025 M Street, N.W. - Room 5002
Washington, D.C. 20554

Tim Maguire *
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W. - Room 5002
Washington, D.C. 20554

A. Richard Metzger, Chief *
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. - Room 500B
Washington, D.C. 20554

Geraldine Matise *
Chief, Network Services Division
Common Carrier Bureau
2000 M Street, N.W. - Room 235
Washington, D.C. 20554

Kent Nilsson (5 copies) *
Deputy Division Chief
Network Services Division
Common Carrier Bureau
2000 M Street, N.W. - Room 235
Washington, D.C. 20554

David Ward *
Network Services Division
Common Carrier Bureau
2000 M Street, N.W. - Room 210N
Washington, D.C. 20554

Marty Schwimmer *
Network Services Division
Common Carrier Bureau
2000 M Street, N.W. - Room 290B
Washington, D.C. 20554

Lawrence Petak *
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W. - Room 230
Washington, D.C. 20554

Charles Iseman *
Policy Division
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W. - Room 230
Washington, D.C. 20554

Jim Burtle *
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W. - Room 230
Washington, D.C. 20554

David Sylvar *
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W. - Room 230
Washington, D.C. 20554

Mark C. Rosenblum
Ava B. Kleinman
Seth S. Gross
AT&T Corp.
Room 3252F3
295 North Maple Avenue
Basking Ridge, NJ 07920

Douglas I. Brandon
VP, External Affairs and Law
AT&T Wireless Services
Fourth Floor
1150 Connecticut Avenue
Washington, DC 20036

Dean Grayson
Lucent Technologies, Inc.
Corporate Counsel
1825 "Eye" Street, NW
Washington, DC 20006

Catherine Wang
Swidler & Berlin
Ericsson Inc.
3000 "K" Street, NW
Suite 300
Washington, DC 20007

The Honorable Janet Reno
Attorney General
Department of Justice
Constitution Ave. & 10th Street, NW
Washington, DC 20530

Stephen W. Preston
Deputy Assistant Attorney General
Civil Division
Department of Justice
601 D Street, NW
Washington, DC 20530

Douglas N. Letter
Appellate Litigation Counsel
Civil Division
Department of Justice
601 D Street, NW
Washington, DC 20530

The Honorable Louis J. Freeh
Director
Federal Bureau of Investigation
J. Edgar Hoover Building
935 Pennsylvania Avenue, NW
Washington, DC 20535

Larry R. Parkinson
General Counsel
Federal Bureau of Investigation
935 Pennsylvania Ave, NW
Washington, DC 20535

Grant Seiffert
Director of Government Relations
Matthew J. Flanigan
President
Telecommunications Industry Association
1201 Pennsylvania Avenue, NW
Suite 315
Washington, DC 20004

Stewart A. Baker
Thomas M. Barba
James M. Talens
L. Benjamin Ederington
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

International Transcription Service, Inc. *
1231 20th Street, N.W.
Washington, DC 20036

Kevin C. Gallagher
Senior Vice President -- General
Counsel and Secretary
360° Communications Company
8725 W. Higgins Road
Chicago, IL 60631

Pamela Riley
David A. Gross
AirTouch Communications, Inc.
1818 N Street NW
Washington, DC 20036

Elaine Carpenter
Aliant Communications, Inc.
1440 M Street
Lincoln, NE 68508

Glenn S. Rubin
Federal Regulatory Counsel
ALLTEL Corporate Services, Inc.
655 15th Street, NW
Suite 220
Washington, D.C. 20005

Richard J. Metzger
Emily M. Williams
Association for Local Telecommunications Services
888 17th Street NW, Suite 900
Washington, D.C. 20006

Barbara J. Kern
Counsel
Ameritech Corporation
2000 West Ameritech Center Drive
Room 4H74
Hoffman Estates, IL 60196

John T. Scott, III
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004

Gerald W. Fikis
Group Leader - Technology & Business Line Management
Bell Emergis - Intelligent Signalling Technologies
Suite 412
78 O'Connor Street
Ottawa, ON Canada K1P 3A4

Michael P. Goggin
BellSouth Cellular Corp.
Suite 910
1100 Peachtree Street, NE
Atlanta, GA 30309-4599

M. Robert Sutherland
Theodore R. Kingsley
BellSouth Corporation
Suite 1700
1155 Peachtree Street, NE
Atlanta, GA 30309-6310

J. Lloyd Nault, II
BellSouth Telecommunications, Inc.
4300 BellSouth Center
675 Peachtree Street, NE
Atlanta, GA 30375

Charles M. Nalbone
BellSouth Personal Communications, Inc.
Suite 400
3353 Peachtree Road, NE
Atlanta, GA 30326
(404) 841-2017

Michael W. White
BellSouth Wireless Data, LP
10 Woodbridge Center Drive, 4th Floor
Woodbridge, NJ 07095-1106

Michael Altschul
Vice President and General Counsel
Randall S. Coleman
Vice President, Regulatory Policy
& Law
Cellular Telecommunications
Industry Association
1250 Connecticut Ave., NW
Suite 200
Washington, DC 20036

Daniel J. Weitzner, Deputy Director
James X. Dempsey, Senior Staff Counsel
Center for Democracy and Technology
1634 I Street, NW, Suite 1100
Washington, DC 20006

Martin L. Stern
Lisa A. Leventhal
Preston Gates Ellis & Rouvelas Meeds LLP
1735 New York Avenue, NW
Suite 500
Washington, DC 20006